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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

EDMUND C. SHERIDAN, *Appellant*,

v.

ALFRED GARDNER, et al., *Appellees*.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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INDEX

	Page
Jurisdictional Statement	1
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Statute Involved	3
Statement	4
The Questions Are Substantial	6
Conclusion	12
Appendix A	1a
Appendix B	17a

CITATIONS

CASES:

Baggett v. Bullett, 377 U.S. 360	11
Barrows v. Jackson, 346 U.S. 249	9
Bowie v. City of Columbia, 378 U.S. 347	11
Corcoran v. Commonwealth, 335 Mass. 29	10
Cummings v. Missouri, 4 Wall. 227	9
Ex parte Garland, 4 Wall. 333	9
Garner v. Board of Public Works of the City of Los Angeles, 341 U.S. 716	9
Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539	8
Lathrop v. Donohue, 367 U.S. 820	2
Lawrence v. State Tax Commission, 286 U.S. 282	2
Quinn v. United States, 349 U.S. 155	8
Reisman v. Caplin, 375 U.S. 440	12
Sadler v. Industrial Trust Co., 327 Mass. 10	11
Sadler v. Industrial Trust Co., 327 Mass. 759	11
School District of Abington Twp. v. Schempp, 374 U.S. 203	10
Sweezy v. New Hampshire, 354 U.S. 234	10
United States v. Icardi, 140 F. Supp. 383	7
United States v. Lovett, 328 U.S. 303	9

	Page
United States v. Rumely, 345 U.S. 41	10
Uphaus v. Wyman, 360 U.S. 72	8
Watkins v. United States, 354 U.S. 178	10
Wieman v. Updegraff, 344 U.S. 183	9
Williams v. Bruffy, 96 U.S. 176	2
CONSTITUTION:	
U.S. Constitution, Art. I, Sec. 10	5, 6
U.S. Constitution, Amendment XIV	5
STATUTES:	
Title 28, United States Code, Section 1257(2)	2
Massachusetts Resolves, 1962, c. 146	2, 3
Mass. G.L. c. 231	4
RULES OF COURT:	
United States Supreme Court Rule 13(i)	3
LEGISLATIVE REPORTS:	
Massachusetts Crime Commission, Second Report	5
Massachusetts Crime Commission, Third Report	5, 6

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JURISDICTIONAL STATEMENT

Appellant appeals from the decree of the Superior Court of Massachusetts, entered on September 16, 1964, in accordance with the rescript and opinion of the Massachusetts Supreme Judicial Court, entered February 6, 1964. The decree vacated a preliminary injunction previously granted by the Massachusetts

Superior Court in favor of the Appellant, and denied the declaratory relief requested by the Appellant. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The decree of The Superior Court is unreported, and appears in Appendix B hereto. The opinion of The Supreme Judicial Court of Massachusetts is reported in 1964 Adv. Sh. 229. Copies of this opinion are attached hereto in Appendix B.

JURISDICTION

This suit was brought under Massachusetts General Laws (Ter. Ed.) C. 231A for a declaratory judgment and ancillary relief. The Massachusetts Superior Court reported it for determination of questions of law by the Supreme Judicial Court upon an agreed statement of facts. The Supreme Judicial Court entered judgment and rescript on February 6, 1964. In accordance with this rescript The Massachusetts Superior Court entered a decree on September 16, 1964. The jurisdiction of The United States Supreme Court to review this decision on appeal is conferred by Title 28, United States Code, Section 1257(2). The following cases sustain the jurisdiction of the Supreme Court to entertain this appeal: *Lathrop* v. *Donohue*, 367 U.S. 820, 824-5, rehearing den. 368 U.S. 871; *Williams* v. *Bruffy*, 96 U.S. 176, 183; *Lawrence* v. *State Tax Commission*, 286 U.S. 282-3.

The appeal is timely, notice of appeal having been filed in the Superior Court on May 5, 1964. The time

for docketing has been extended successively, by order of the Massachusetts Superior Court, to October 23, 1964, by reason of delay in the Court's framing and filing a final decree. Rule 13(i), United States Supreme Court.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) Whether a state legislative commission which has reported, pursuant to its statutory duty, that it cannot recommend legislation until the persons guilty of wrongdoing have been named and convicted, and which is authorized to present evidence to the grand jury, can compel the cooperation of witnesses without violating the due process clause of the Fourteenth Amendment.

(2) Whether Resolves 1962, c. 146, of the Commonwealth of Massachusetts, enacts a bill of attainder, in violation of Article I, Section 10, of the United States Constitution, by disqualifying from membership on a legislative commission "any member of the immediate family" of a person convicted of a felony, gaming offense or any misdemeanor involving moral turpitude.

(3) Whether the vagueness of the terms "organized crime" and "corrupt practices," used to define the scope of a state legislative investigation, offends the due process clause of the Fourteenth Amendment, when witnesses are compelled to testify under the threat of contempt procedures and penalties.

STATUTE INVOLVED

Chapter 146 of the Massachusetts Resolves of 1962 is set forth in Appendix B hereto.

STATEMENT

On September 13, 1963, the Appellees, purporting to act as the Massachusetts Crime Commission, caused to be served on the Appellant a summons directing him to appear, bring documents, and testify before the Commission on September 16, 1963. The date was later extended by agreement to October 16, 1963.

The subject concerning which the Appellant was subpoenaed to give evidence and produce documents was his knowledge "relating to the existence and extent of corrupt practices in government at state and local levels in the Commonwealth." Without limiting the breadth of the foregoing, the subpoena included the following particular areas: "the deposit of funds of the Department of Public Works, the State Treasurer, and the Metropolitan Transit Authority with the [material deleted by order of the Superior Court]."

Appellant thereupon filed a petition in the Superior Court for Suffolk County, which was amended by permission on October 11, 1963. Appellant sought equitable relief in the form of a temporary restraining order (and, after hearing, a preliminary injunction) to restrain respondents from interfering with Appellant in any way and from requiring his attendance at any hearing of the alleged commission. Appellant further sought a binding declaration under Mass. G. L. c. 231A of the right, duty, status and other legal relations of Appellant and Appellees. The Attorney General was notified of the proceedings in accordance with the provisions of G. L. c. 231A, sec. 8 and entered his appearance therein.

The petition set forth, as a basis for the relief sought, various grounds including those derived from the

Constitution of the United States. The petition specifically alleged (inter alia) that the enabling legislation was void: (1) by reason of vagueness in violation of the due process clause of the Fourteenth Amendment in the use of the phrase "organized crime . . . and corrupt practices" in describing the scope of the authorized investigation; (2) by enacting a bill of attainder, in violation of Article I, Section 10, through legislative disqualification from membership on the Commission of any "member of the immediate family" of persons convicted of a felony, gaming offenses, or any misdemeanor involving moral turpitude; and (3) by authorizing a legislative investigatory agency to present evidence to a grand jury, thus commingling legislative investigatory and non-legislative prosecutory functions in violation of the due process clause of the Fourteenth Amendment.

Issue was joined on these questions and the case was reported to the Massachusetts Supreme Judicial Court without decision by the Superior Court. All of the material facts were incorporated in an agreed statement of facts. The Appellant's claims based on the United States Constitution were briefed and argued before the Supreme Judicial Court. In the course of the oral argument, counsel for each side made reference to the Second and Third Reports of the Massachusetts Crime Commission. The Chief Justice requested copies and, by subsequent order of the Superior Court, they have been made a part of the Record.

The Second Report (May 22, 1963) includes these statements: "If and when evidence of corruption by an individual is discovered by the Commission, it is the duty of the Commission to make it available for

grand jury action." (p. 2) "If The Commission is not given enough money for an all out program it will not be able to do more than continue limited investigations which give little promise of getting at the heart of the problem by the exposure and punishment of the key persons who are responsible for the corruption at state levels." (p. 9)

The Third Report (December 2, 1963) contains this statement:

> The Commission has a primary duty to report to the General Court any corrupt practices that its investigations may uncover and to recommend remedial legislation. It is not yet ready to do so. Its reports of corrupt practices and its recommendations for remedial legislation will not carry weight unless the existence and nature of corruption can be shown by naming the persons who have geen guilty of corrupt practices and by describing the patterns of their corruption. *This cannot be done until their guilt has been proven by their conviction."* (Emphasis supplied.)

On February 6, 1964 the Supreme Judicial Court filed an Opinion and entered a Rescript directing the Superior Court to vacate the preliminary injunction and to enter a declaratory judgment in accordance with the Opinion.

The Opinion rejected all of the grounds urged by the Appellant, including the federal constitutional claims. The decree was entered by the Superior Court, on September 16, 1964, and expressly declared that the restrictions on qualifications of members of the Commission did not violate Article I, section 10; that the Resolve creating the Commission did not create "any new criminal offense," and the words "corrupt

practices in government" are sufficiently definite to satisfy the Fourteenth Amendment; and that the Fourteenth Amendment is not violated merely because "the work of the Commission may result in a showing that some individuals have committed crimes." In failing to declare concerning the specific argument of the Appellant based upon the prosecutory powers and purposes of the Commission, the Superior Court followed the Opinion of the Supreme Judicial Court which refused to rule on this issue at this time.

Before the decree was entered, the Appellees filed a motion to dismiss the case as moot, asserting that they "do not now intend to cause any summons to be issued to the petitioner requiring said petitioner's appearance or testimony before the Commission on any matter presently under investigation by the Commission." This motion was opposed by the Appellant and the motion was denied on September 16, 1964, no evidence having been presented in support of the motion.

THE QUESTIONS ARE SUBSTANTIAL

The questions in this case are substantial because the record reveals substantial deviations from constitutional norms, carried out in a context in which political safeguards are notoriously lacking.

1. The mingling of investigatory powers and prosecutory powers in legislative commissions raises a substantial issue of due process. Appellant is not asking the Court to enforce a state's own notions (or federal notions) of separation of powers. However, fundamental fairness, as demanded by due process, sets limits on the use of inquisitorial techniques in public prosecution. *United States* v. *Icardi*, 140 F. Supp. 383 (U.S.D.C., D.C.).

This Court has adverted to the problem in *Quinn* v. *United States*, 349 U.S. 155, 161, but has not previously been presented with a case which requires an application of the due process clause of the Fourteenth Amendment rather than the stricter limitations of federal separation of powers. Furthermore, previous decisions of the Court have failed to give a clear answer whether state legislative investigatory bodies may exercise powers not related to the legislative process. *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 561 (Douglas, J. concurring).

In the instant case a legislative Commission, given the duty to investigate and report to the legislature, has declared that its *first task* must be to prosecute and obtain convictions. In this inquisitorial role it has been aided by legislative authorization to present evidence directly to a grand jury. The deliberate failure of the Massachusetts Supreme Judicial Court to deal with this point, raised and argued by the Appellant, is a refusal to recognize a federal constitutional right as a ground for declining to appear before the Commission.

It is submitted that the declared purpose of the Commission to secure convictions before reporting findings to the legislature, and to use its special powers to that end, raises a substantial question whether these combined inquisitorial and prosecutory roles violate due process and destroy the competence of the Commission. See *Uphaus* v. *Wyman*, 360 U.S. 72, 82-108 (Brennan, J. dissenting).

2. The Appellant has been issued a summons to appear before a Commission created by a legislative Resolve which embodies a bill of attainder. The legislative declaration that members of the immediate

family of persons convicted of felonies and specified misdemeanors, has the practical effect of including innocent persons in the guilt incurred by their kin for past offenses. This Court has held that disqualification from office can be a punishment within the prohibition against bills of attainder in Article I, Section 10 of the Constitution. *Ex parte Garland,* 4 Wall. 333; *United States* v. *Lovett,* 328 U.S. 303. A claim that the exclusion from office is merely the setting of reasonable qualifications will not prevent a finding that a bill of attainder has been enacted. *Cummings* v. *Missouri,* 4 Wall. 277.

The substantiality of the violation of the federal Constitution in this case is made apparent by the fact that the disqualification from office is extended not only to a class of persons who have committed wrong, *but to their innocent family members.* This is a bill of attainder with a variety of corruption of blood (and marriage). If innocent persons cannot be disqualified from public office (see: *Garner* v. *Board of Public Works of the City of Los Angeles,* 241 U.S. 716) the invidious disqualification based upon the accident of family membership must be unconstitutional. *Wieman* v. *Updegraff,* 344 U.S. 183.

It is not claimed that the appellant is one of the class of persons disqualified from membership on this Commission. However, this is a situation in which the question could never be raised and the constitutional violation could never be terminated unless a party in the position of the appellant is allowed to raise this issue. In this respect the case is like *Barrows* v. *Jackson,* 346 U.S. 249. Persons within the excluded class would have no standing to raise the issue because they could not show they would otherwise have been appointed.

Unless one summoned as a witness can raise the issue, it will go unanswered. In this context a witness has the most concrete interest in the constitutionality of the enabling statute or resolve. See: *School District of Abington Twp.* v. *Schempp*, 374 U.S. 203. It is submitted that there is a substantial federal constitutional question whether one can be compelled to appear before a Commission which has been created and manned under a legislative enactment barring innocent persons who happen to be family relatives of convicted persons.

3. A substantial constitutional issue arises by reason of compulsory process being used to compel attendance at a government investigation into a subject which is inadequately defined, being described merely as "corrupt practices." This delegation to the Commission is so broad that the legislature could not have ascertained a public need for the information being sought. *Sweezy* v. *New Hampshire*, 354 U.S. 234. By compelling attendance the Commission is interfering with liberty of the Appellant, and the terms of the enabling Resolve are too vague to reveal a justification.

Moreover, the Resolve has the effect of defining a new crime, because attendance and testimony can be compelled as in criminal cases. Under Massachusetts law this exposes the witness to criminal punishment for contempt. See: *Corcoran* v. *Comm.*, 335 Mass. 29. Although enforcement is only by judicial order, the Resolve is so vague as to provide no standard by which a court can judge the propriety of the subject or scope of a Commission investigation, or the propriety of individual questions. *Watkins* v. *United States*, 354 U.S. 178. See: *United States* v. *Rumely*, 345 U.S. 41.

It is submitted that the liberty of citizens should be protected against improper compulsory process and this case raises a substantial issue of infringement through the grant of vague investigatory powers.

Even if The Superior Court subsequently narrows the rage of inquiry open to the Commission, this cannot correct the vagueness in the statute. The Petitioner, upon receipt of the summons, is faced with the necessity of deciding whether or not to appear. The opinion and rescript of the Supreme Judicial Court, followed by the decree of the Superior Court, expose him to criminal and civil contempt penalties should he fail to heed the call of the Commission.

Any subsequent narrowing of the scope of inquiry cannot be used to correct or change the defects of vagueness without partaking of the nature of an ex post factor law. *Bowie* v. *City of Columbia*, 378 U.S. 347. What must be kept in mind is that the summoned witness is called to a double duty: to appear, and to respond to questions. The first interference with his liberty, compulsory appearance, occurs before any opportunity will arise to give further definition to the scope of the enquiry. The situation parallels that in which a party is required to take a vague oath and will be punished if he violates it. *Baggett* v. *Bullett*, 377 U.S. 360. In the adjudication of alleged violations, the meaning of the oath may be defined and narrowed, but an abridgement of freedom will have already occurred in requiring the taking of the oath.

The decree in this case becomes res judicata in Massachusetts and forecloses further attack on the summons. *Sadler* v. *Industrial Trust Co.*, 327 Mass. 10; *Sadler* v. *Industrial Trust Co.*, 327 Mass. 759.

In this respect the case is clearly distinguishable from *Reisman* v. *Caplin*, 375 U.S. 440, where a forum was left open for challenges to the summons. Appellants constitutional claims cannot be heard again in Massachusetts.

CONCLUSION

It is submitted that the decree of the Massachusetts Superior Court subjects the Appellant to compulsory process issued by a Commission which is incompetent by reason of (1) the vagueness of the legislative resolve which created it, (2) the unconstitutional disqualifiaction of innocent persons from membership, and (3) the combination in its charter (and in its declared program) of legislative investigation with criminal prosecution. We believe that the questions raised by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX A

Opinion of Mass. Supreme Judicial Court

EDMUND C. SHERIDAN

v.

ALFRED GARDNER & others.

WILKINS C. J. This bill for declaratory relief has been reported without decision by a judge of the Superior Court upon the pleadings and a statement of agreed facts amounting to a case stated. Further proceedings have been stayed, and the defendants enjoined from taking further steps to procure the attendance of the plaintiff as a witness, as hereinafter discussed. The prayer for declaratory relief is vague. It asks a binding declaration "of the right, duty, status and other legal relations" of the parties.

Seven defendants are the members of the commission (sometimes called Massachusetts Crime Commission) appointed by the Governor pursuant to Res. 1962, c. 146, and the remaining two are their counsel. The plaintiff is a resident of Boston upon whom on September 13, 1963, service was made of a paper, in form a summons, by sergeant of the State police. The summons was directed to the plaintiff at the Department of Public Works to appear before the commission on September 16. It required the plaintiff "to give evidence of what you know relating to the existence and extent of corrupt practices in government at state and local levels in the Commonwealth and in particular to the following: the deposit of funds of the Department of Public Works, the State Treasurer, and the Metropolitan Transit Authority with the . . . [name of bank deleted by order of Superior Court] and you are further required to bring with you all correspondence, memoranda, records, or writings of any sort pertaining to the deposit of funds of the Department of Public Works at the" said bank. On the reverse side of the summons are printed "The Rules of Procedure Governing the Con-

duct of Hearings Before the Massachusetts Crime Commission."

The plaintiff has never appeared before the commission. He raises numerous questions under the State and Federal Constitutions assailing the validity of the commission and of its summons. The Attorney General has been notified in accordance with G. L. c. 231A, § 8.

1. This is a suit against individual members of a board and their counsel, and is neither in form nor in substance, against the Commonwealth. Most obviously, it is not within the holding of *Executive Air Serv. Inc.* v. *Division of Fisheries & Game*, 342 Mass. 356, where declaratory relief was sought as to land of the Commonwealth, which was a necessary party. See *Demetropolos* v. *Commonwealth*, 342 Mass. 658, 661. See also *Moneyweight Scale Co.* v. *McBride*, 199 Mass. 503, 505-506, *S. C.* (appeal dismissed) 223 U.S. 749; *Commonwealth* v. *Norman*, 249 Mass. 123, 130-131.

2. It is objected that the resolve violates art. 30 of the Declaration of Rights in that it authorizes the executive department to exercise a legislative power in appointing the members. We do not agree. The first paragraph of the resolve reads: "That an unpaid special commission to consist of seven members appointed by the governor is hereby established to investigate and study as a basis for legislative action the existence and extent of organized crime within the commonwealth and corrupt practices in government at state and local levels, the existence of conditions which tend or may tend to prevent or interfere with the proper enforcement of the laws relating thereto, the existence of physical, legal and policy limitations on the powers and functions of those charged with the duty of enforcement of said laws and the extent to which the power of the government of the commonwealth in relation to the enforcement of said laws may or should be properly exercised at state and local levels."

The power to fill vacancies is in the Government, who shall from time to time designate one of the members as chairman.

The resolve also provides: "The commission shall report to the general court annually on or before the first Wednesday in December in each year the results of its investigations and study and its recommendations, if any, together with drafts of legislation necessary to carry such recommendations into effect by filing the same with the clerk of the senate and shall file a final report not later than the last Wednesday in June, nineteen hundred and sixty-five. The commission shall also file a copy of each such report with the governor."

In *Attorney Gen.* v. *Brissenden*, 271 Mass. 172, the entrusting of a legislative investigation to a member of the executive department, namely, the Attorney General, was held not to violate art. 30. At page 181, it was said by Chief Justice Rugg, speaking for the court: "The ascertainment of pertinent facts as the basis for legislation is within the power of the law making department of government. When a legislative body has a right to do an act, it must be allowed to select the means within reasonable bounds. It is not precluded from delegating incidental powers which it may exercise itself in aid of its primary functions but which do not partake of the nature of law making. Authority to obtain information necessary for its determination concerning the exercise of the power to enact laws may be conferred upon nonlegislative bodies .... Where facts are necessary as a basis for legislative action, the General Court may ascertain them in any reasonable way. Familiar methods are by appropriating the results of studies already made by itself or by others, by conducting an inquiry through a committee of its members, or by utilizing an existing commission or board to make and report the results of a research."

The product of the work of the commission would be a reasonable source of information to the Legislature, which

still would have the exclusive power to decide what, if any, legislation should be enacted. There is nothing in art. 30 which requires that investigations in aid of possible legislation should be conducted in whole, or in part by members of the General Court. Indeed, the right of petition guaranteed by art. 19 of the Declaration of Rights conclusively points to the contrary. See, similarly, the First Amendment of the Constitution of the United States.

It is common knowledge that legislation frequently is proposed by a Governor and by other executive officers of the State. The Acts and Resolves over the years contain hundreds of examples where the Legislature has exercised its powers to conduct investigations, obtain facts, and receive reports through commissions and specified officers and boards. In the very many instances the Governor has appointed a majority of the members of a commission. In a large number there have been no legislative members. In others the commissions created, or the boards designated, by the Legislature were empowered to hold hearings and to make report to the Legislature with drafts of recommended legislation. Res. 1947, c. 53. Res. 1949, cc. 28, 34, 46, 48. Res. 1950, cc. 46, 56. Res. 1951, c. 64. Res. 1952, cc. 71, 77. Res. 1961, c. 22. Res. 1962, cc. 86, 120. Res. 1963, c. 144.

Appointment of members of a legislative recess commission by the Governor was approved in *Opinion of the Justices*, 302 Mass. 605, 620. In *Brown* v. *Russell*, 166 Mass. 14, 25, it was said that the Legislature, barring a constitutional limitation on its power, could confer power of appointment to offices created by it upon public officers or boards. This statement was quoted with approval in *Bradley* v. *Board of Zoning Adjustment of Boston*, 255 Mass. 160, 165.

3. The conferring of the power to summon does not affect the validity of the Legislature's delegation of au-

thority to the commission.[1] In *Attorney Gen.* v. *Brissenden*, 271 Mass. 172, 183-184, it was said, "There are numerous instances, in the actions of the General Court, where power has been vested in courts to compel the attendance and the giving of testimony by witnesses before boards, commissions and other bodies exercising quasi judicial powers or powers of inquiry as to facts. . . . The court is ever solicitous to maintain the sharp division between the three departments of government as declared by art. 30 of the Declaration of Rights. . . . But that bound has not been overstepped by the present resolves. We are of opinion that the question, whether the defendant may be compelled to testify before the plaintiff as to the matters disclosed on this record, is judicial in its nature. The provision of the resolves authorizing this court to compel the defendant to give testimony is a vaild exercise of legislative power and confers jurisdiction to act."

There is no merit in the assertion that art. 30 of the Declaration of Rights is violated because a discretion in the courts to refuse an application enables the judiciary to prohibit the Legislature from examining particular witnesses or posing particular questions.

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[1] In the fourth paragraph of the resolve it is provided: "The commission may require by summons the attendance and testimony under oath of witnesses and the production before it of books and papers relating to any matter being investigated by it pursuant to the provisions of this resolve. Such a summons may be issued by the commission only upon a vote of the commission and shall be served in the same manner as summonses for witnesses in criminal cases issued on behalf of the commonwealth and all provisions of law relative to summonses issued in such cases shall apply to summonses issued under this resolve so far as applicable. Any justice of the supreme judicial court or of the superior court may upon application by the commission compel the attendance of witnesses summoned as aforesaid and the giving of testimony under oath before the commission in furtherance of any investigation under this resolve in the same manner and to the same extent as before said courts."

4. The second paragraph of Res. 1962, c. 146, contains the following: "No member shall hold any public office except that of justice of the peace or notary public or be a member or employee of any political committee. Not more than four of said members shall at any one time be members of the same political party. No person who has been convicted of a felony, gaming offense or any misdemeanor involving moral turpitude, *nor any member of the immediate family of any such person,* and no person who has served as a member of . . . [a previous crime commission] *shall be eligible for for appointment to the commission*" (emphasis supplied).

(a) The plaintiff contends that the italicized words constitute a bill of attainder and an ex post factor law in violation of art. 24 or art. 25 of the Declaration of Rights and of art. 1, § 10, of the Constitution of the United States. "The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt. . . . The mark of an *ex post factor* law is the imposition of what can fairly be designated punishment for past acts." *De Veau* v. *Braisted,* 363 U.S. 144, 160.

From the italicized words read in context, it is clear that the Legislature was directing its sights at the qualifications of the members with a view to enabling the creation of a commission which would impart an innate idea of independence and integrity and with the purpose to instill a public sense of security and confidence in a body to which was to be confided authority in sensitive areas. See *Brown* v. *Russell,* 166 Mass. 14, 17, 25-26; *Ross* v. *Crane,* 291 Mass 28, 33. There was plainly no intent to declare guilt or to impose punishment. See *Garner* v. *Board of Pub. Works of Los Angeles,* 341 U.S. 716, 722; *Flemming* v. *Nestor,* 363 U.S. 603, 613-616.

We are equally of opinion that no guilt was declared or punishment imposed. More than one class of persons were barred. It is not contended that holders of public office,

members and employees of political committees, and members of former crime commissions could not properly be excluded, nor that the number of members of a political party could not be limited. No suggestion of declaration of guilt or of punishment for crime can be made as to them. The exclusion of persons convicted of felonies, gaming offences, and misdemeanors involving moral turpitude does not establish an unreasonable qualification for membership. *Hawker* v. *New York*, 170 U.S. 189. *De Veau* v. *Braisted*, 363 U.S. 144, 158-160. There is no contrary contention. The members of the families of persons so convicted, the Legislature might well have felt, could be swayed in the performance of their duties on a crime commission by considerations of sympathy or of family loyalty. Their exclusion from this temporary unpaid body was a reasonable means of achieving a legitimate State aim. See opinion of Mr. Justice Brennan in *De Veau* v. *Braisted*, *supra*, 161. See also *Ashley* v. *Three Justices of the Superior Court*, 228 Mass. 63, 78, *S. C.* (appeal dismissed sub dom. *Ashley* v. *Wait*) 250 U.S. 652; *Faxon* v. *School Comm. of Boston*, 331 Mass. 531, 535-538.

(b) For similar reasons another contention of the plaintiff fails. The resolve is not invalid as establishing inequality of opportunity to hold public office or employment in violation of art. 1 of the Declaration of Rights and does not deny the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States. There are other and fatal objections to the plaintiff's other argument under the Declaration of Rights. Article 9 expressly applies only to elected officials. *Ashley* v. *Three Justices of the Superior Court*, 228 Mass. 63, 78. Article 6 concerns hereditary titles and offices. Article 7 is so clearly inapposite as to need no discussion.

5. The sixth paragraph of Res. 1962, c. 146, reads, "Upon order of the commission its counsel shall present to a grand jury for its action, or submit to the attorney general, a district attorney or other law enforcement agency, such

evidence which has come to the attention of the commission as in the opinion of the commission warrants such presentation or submission."

(a) The plaintiff argues that this provision authorizes the commission by its counsel to go before the grand jury in person, and that this would be in violation of art. 12 of the Declaration of Rights. The record in this suit does not show that its counsel has done so or that there has been any such order of the commission. Until a case presenting this issue comes before us we shall not undertake to evaluate in its context the precise meaning of the word "present." Should we at that time be of opinion that such an appearance is apparently authorized, and should we also be of opinion that such authorization would be contrary to some constitutional provision, it would then become our duty, if possible, so to construe the resolve as to avoid reasonable constitutional doubts. *Opinion of the Justices*, 330 Mass. 713, 726. *Commonwealth* v. *Benoit*, — Mass. —, —,[2] and cases cited. *United States* v. *Rumely*, 345 U.S. 41, 45-47.

(b) The plaintiff also makes the contention that this provision violates art. 30 of the Declaration of Rights, relating to the separation of powers, and the due process clause of the Fourteenth Amendment of the Constitution of the United States because it gives a legislative investigatory commission power to prosecute individuals for crime.

As we have observed earlier in the opinion, point 2, *supra*, the Legislature is empowered to conduct hearings in aid of legislation, and to conduct them itself or in some other reasonable way, of which the commission is an example. See *McGrain* v. *Daugherty*, 273 U.S. 135, 177-178; *Quinn* v. *United States*, 349 U.S. 155, 160-161; *Hutcheson* v. *United States*, 369 U.S. 599, 616. But that power is "sub-

[2] Mass. Adv. Sh. (1964)

ject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. . . . Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn* v. *United States, supra,* 161. "[T]here is no congressional power to expose for the sake of exposure." *Watkins* v. *United States,* 354 U.S. 178, 200. Unlike interference with the constitutional right of free speech (see *Sweezy* v. *New Hampshire,* 354 U.S. 234; *Watkins* v. *United States, supra,* 196-197; *Gibson* v. *Florida Legislative Investigation Commn.* 372 U.S. 539, 544), no one has constitutional protection in engaging in organized crime or in corrupt practices in government.

The plaintiff lays great store by *United States* v. *Icardi,* 140 F. Supp. 383 (D. D. C.) That case, which arose out of the questioning of a witness by a subcommittee of Congress, is quite distinguishable from one at bar. There the subcommittee had been created for the expressed purpose of investigating a single crime (a murder in the armed forces in Italy during the Second World War). The United States District Court judge found in substance that there was no valid legislative purpose, where the subcommittee already knew all the facts behind the questioning.

In the case at bar the resolve on its face serves a legitimate legislative purpose. This purpose is not nullified because some individuals are shown to have committed crimes. *McGrain* v. *Daugherty, supra,* 179-180. *Hutcheson* v. *United States, supra,* 613. *Nelson* v. *Wyman,* 99 N.H. 33, 38. In *Matter of Di Brizzi,* 303 N.Y. 206, 216-217. In the hearing stage at least no witness before the commission could claim to be punished by publicity, as the resolve prescribes that all hearings before it shall be private.[3]

[3] The fifth clause of the resolve contains such a requirement: "Witnesses shall testify only at private hearings and the same provisions with reference to secrecy which govern proceedings of a grand jury shall govern all proceedings of the commission."

So far as concerns the Fourteenth Amendment, the Supreme Court of the United States "has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255. *Dreyer* v. *Illinois*, 187 U.S. 71, 83-84. *Carfer* v. *Caldwell*, 200 U.S. 293, 297. That question, however, is clearly open under art. 30 of the Declaration of Rights.

The courts of other States, unanimously so far as we have been able to learn, have held that the doctrine of the separation of powers is not violated. In *Nelson* v. *Wyman*, 99 N. H. 33, 38, it was said, "When the investigation provided for is a general one, the discovery of a specific, individual violation of law is collateral and subordinate to the main object of the inquiry. . . . The existence of such a possibility does not change the investigation from a legislative to a criminal one." *In Matter of Di Brizzi*, 303 N.Y. 206, 216, it was said, "The fact that the Attorney-General and the members of the Crime Commission, in determining whether there exists a relationship between organized crime and units of government, may find it necessary to inquire as to whether individual crimes have been committed does not, as petitioner urges, render the investigation unconstitutional as a usurpation of the traditional province of the grand jury in each county of the State. This is a *general* investigation into *organized* crime and its relation to government." See *Washington* v. *Superior Court*, 40 Wash. 2d 502.

In *Eggers* v. *Kenny*, 15 N.J. 107, it was held that an investigating committee of the Board of Commissioners of Jersey City, which was a legislative body, might conduct an inquiry in aid of its proper legislative functions, even though the subject of inquiry might also be the proper concern of the courts and grand juries in their enforce-

ment of the criminal laws. In so doing the court overruled an earlier case holding to the contrary because of its "disastrous effects" (p. 119).

6. The plaintiff asserts that Res. 1962, c. 146, is so broad as to allow the commission, which is not composed of legislators, to inquire into corrupt practices in connection with the election of members to the General Court and, to the extent that it does, is in violation of the Constitution, Part II, c. 1, § 2, art. 4, and Part II, c. 1, § 3, art. 10. He relies upon *Dinan* v. *Swig*, 223 Mass. 516, which concerned the courts. The commission is not a court. *Commonwealth* v. *Benoit*, — Mass. —, —.[4] We do not interpret the resolve as conferring power to adjudge corruption in the election of members to the General Court. It must be construed, as is possible, so as to avoid reasonable constitutional doubts. *Commonwealth* v. *Benoit*, *supra*, ——.[5] The commission, of course, is not engaged in inquiring into corrupt practices in the election of members of the General Court. See *Ashley* v. *Three Justices of the Superior Court*, 228 Mass. 63, 81.

7. Violation of art. 12 of the Declaration of Rights and of the Fourteenth Amendment of the Constitution of the United States is charged by the plaintiff because, it is said, the resolve creates a crime which lacks certainty and definiteness. For this the reason assigned is that the resolve extends the circumstances in which a criminal offence can be found to have been committed, the offense being contempt for failure to answer a summons or failure to testify. Assailed are the stated purposes of the resolve, namely, "the existence and extent of organized crime within the commonwealth and corrupt practices in government at state and local levels."

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[4] Mass. Adv. Sh. (1964) —, —.

[5] Mass. Adv. Sh. (1964) *supra*, —.

(a) At the outset, we shall put at rest the contention that the resolve creates a new criminal offence. It does not. Failures to respond to a summons or to testify, in and of themselves, are not offences which, without more, make a witness subject to the penalties provided by G. L. (Ter. Ed.) c. 233, §§ 10, 5. Such failures merely make him subject to a court order compelling attendance and the giving of testimony. *Commonwealth* v. *Benoit*, — Mass. —, —.[6]

(b) The plaintiff was not summoned to testify as to "organized crime," although these words are well enough understood to be in the title of numerous articles in legal periodicals.[7] In *Matter of Di Brizzi*, 303 N.Y. 206, there was a Governor's executive order naming members of "the New York State Crime Commisison to investigate and take

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[6] Mass. Adv. Sh. (1964) —, —.

[7] Hodson, Organized Crime, American Crim. L. Q., Vol. 2, No. 1, p. 5 (published by Section of Criminal Law, American Bar Association, and School of Law, University of Kansas). Lumbard, Local and State Action against Organized Crime, Annals of the American Academy of Political and Social Science, May, 1963, p. 82; Miller, A Federal Viewpoint on Combating Organized Crime, *id.* at 93; Ploscow, New Approaches to the Control of Organized Crime, *id.* at 74; Sellin, Organized Crime: A Business Enterprise, *id.* at 12; Woetzel, An Overview of Organized Crime: Mores versus Morality, *id.* at 1; Strong, New England: The Refined Yankee in Organized Crime, *id.* at 40; Tyler, An Interdisciplinary Attack on Organized Crime, *id.* at 100. Patterson, Organized Crime, 18 Texas Bar J., p. 489. Pollner, Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering, 28 Brooklyn L. Rev. 37. Johnson, Organized Crime: Challenge to the American Legal System, 53 J. Crim. L., Criminology and Police Science, 399, 54 J. Crim. L., Criminology and Police Science, 1. Keating, Organized Crime—What Can Congress Do About It? 51 J. Crim. L., Criminology and Police Science, 458. Tyler, The Roots of Organized Crime, 8 Crime and Delinquency, 325. Organized Crime and Illicit Traffic in Narcotics, Hearings before the Permanent Subcommittee on Investigations of the Committee on Government Operations, United States Senate, 88th Cong., 1st Sess. (1963).

action concerning the relationship between organized crime and Government" (p. 211). The court was able to discuss the subject without expressing doubt as to the meaning of the words "organized crime" (pp. 214, 215, 216, 217).

The purpose for which the plaintiff was summoned was to give testimony as to "corrupt practices in government." This is an adequately understandable area for legislative investigation and remedial action. While succinct, the words are sufficiently definite to make clear to a witness, if he knows right from wrong, the purpose of the inquiry and to enable proper interrogation of witnesses. Surely, the words are not so vague and uncertain as to permit us to rule that no proper questions material to the subject by any possibility could be framed at a hearing. Equally surely, the words constitute no valid reason for a person, immediately upon service of a summons, to attack the substance of the resolve before he has appeared and has been interrogated at all. When a witness appears at a hearing, he will have a suitable opportunity to challenge the propriety of any question. Should any issue reach the courts, the witness would have the benefit of the principle that "scrupulous care to respect the rights of a witness is mandatory. Any real doubt should be resolved in his favor." *Corcoran* v. *Commonwealth*, 335 Mass. 29, 38.

The summons served upon the plaintiff, although not so limited, in particular sought evidence as to accounts in a specified bank of a State constitutional officer, of a State department, and of a public transportation authority. The import of this part of the summons, at least, could not reasonably be mistaken.

8. We have endeavored to cover all the points raised by the plaintiff even those which, like the prayer for declaratory relief, are in the nature of cryptic suggestions.

The decree of preliminary injunction is to be vacated. A declaratory decree is to be entered in accordance with this opinion.

So ordered.

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT IN EQUITY

SUFFOLK, SS.

No. 81624

EDMUND C. SHERIDAN, *Petitioner*

v.

ALFRED GARDNER, ET AL, *Respondents*

Final Decree After Rescript

This cause came on to be further heard, after rescript from the Supreme Judicial Court for the Commonwealth, and thereupon, upon consideration thereof, it is ORDERED, ADJUDGED and DECREED:

1. That the preliminary injunction against the respondents is herewith vacated.

2. The provisions of Res. 1962, c. 146 authorizing the governor to appoint the members of the Commission established by said Resolve do not violate Article 30 of the Declaration of Rights; nor does the appointment of persons who are not members of the legislature violate such article.

3. The power to summon vested in the Commission established by Res. 1962, c. 146 and the power given to the courts to enforce compliance with the Commission's summonses are valid delegations of legislative authority and do not violate Article 30 of the Declaration of Rights.

4. The restrictions imposed by Res. 1962, c. 146 upon the qualifications of members of the Commission thereby established are reasonable and do not constitute either a bill of attainder or an ex post facto law in violation of Article 24 or Article 25 of the Declaration of Rights, or Article 1, § 10 of the Constitution of the United States.

5. The resolve is not invalid as establishing inequality of opportunity to hold public office or employment in viola-

tion of Article 1 of the Declaration of Rights and does not deny the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States. Neither does the resolve violate Articles 6, 7 and 9 of the Declaration of Rights.

6. The Commission established by Res. 1962, c. 146 is a reasonable and valid delegation of the legislature's power to conduct investigations and hearings in aid of legislation. There is no violation of Article 30 of the Declaration of Rights relating to separation of powers or of the due process clause of the Fourteenth Amendment of the Constitution of the United States by virtue of the fact that the work of the Commission may result in a showing that some individuals have committed crimes.

7. The provisions of Res. 1962, c. 146, do not confer upon the Commission power to adjudge corruption or corrupt practices in the election of members of the General Court and the Commission has not engaged in such inquiries.

8. The provisions of Res. 1962, c. 146 do not create any new criminal offense. Failures to respond to a summons or to testify, in and of themselves, are not offences which, without more, make a witness subject to the penalties provided by G.L. (Ter. Ed.) c. 233, § 10, 5.

9. The purpose of the investigation authorized by Res. 1962, c. 146 and expressed in the words "corrupt practices in government" is sufficiently clear, definite and certain to satisfy the requirements of Article 12 of the Declaration of Rights and the Fourteenth Amendment of the Constitution of the United States. A witness has no reason to attack the Resolve because of the inclusion of said words prior to the time he has appeared and been interrogated. A witness does have a suitable opportunity at a hearing of the Commission to challenge the propriety of any question. If any issue should reach the courts, scrupulous care must be taken to respect the rights of a witness.

10. That on September 13, 1963, a summons was served upon the petitioner purporting to require his appearance before the Commission to give certain testimony. The date for the petitioner's appearance was extended by agreement to October 10, 1963. The summons stated that the petitioner was to appear on said date "and from day to day thereafter until the investigation hereinafter identified is heard by said Commission. . . ." A temporary restraining order was issued by this court on October 9, 1963 and continued in force as a preliminary injunction on October 11, 1963, enjoining the respondents from requiring the attendance or testimony of the petitioner before the Commission. To date the petitioner has not appeared or testified before the Commission. Counsel for the respondents has moved for the dismissal of this action on the grounds that it has become moot. In support of this motion to dismiss, counsel for the respondents has represented to this court that the respondents do not now intend to cause any summons to be issued to the petitioner requiring his appearance or testimony before the respondents on any matter presently under investigation. Counsel for the petitioner has represented that this action is not moot. No evidence was presented to the court on the issue of mootness and no findings have been made on that question.

By the Court, (FELIX FORTE, J.)

Entered: September 16, 1964

COPY

ATTEST:—

THOMAS F. STANTON
Asst. Clerk.

APPENDIX B

Massachusetts Resolves. 1962. Chapter 148

RESOLVE PROVIDING FOR AN INVESTIGATION AND STUDY BY A SPECIAL COMMISSION RELATIVE TO CRIME AND CORRUPTION

Resolved, That an unpaid special commission to consist of seven members, appointed by the governor is hereby established to investigate and study as a basis for legislative action the existence and extent of organized crime within the commonwealth and corrupt practices in government at state and local levels, the existence of conditions which tend or may tend to prevent or interfere with the proper enforcement of the laws relating thereto, the existence of physical, legal and policy limitations on the powers and functions of those charged with the duty of enforcement of said laws and the extent to which the power of the government of the commonwealth in relation to the enforcement of said laws may or should be properly exercised at state and local levels.

No member shall hold any public office except that of justice of the peace or notary public or be a member or employee of any political committee. Not more than four of said members shall at any one time be members of the same political party. No person who has been convicted of a felony, gaming offense or any misdemeanor involving moral turpitude, nor any member of the immediate family of any such person, and no person who has served as a member of the special commission established under chapter one hundred of the resolves of nineteen hundred and fifty-three and revised and continued under chapter one hundred and forty seven of the resolves of nineteen hundred and fifty-five shall be eligible for appointment to the commission. The governor shall fill any vacancy in the commission but a vacancy shall not affect its powers and duties. The governor shall from time to time designate one of the members as chairman.

The commission shall request the commissioner of public safety to assist it in its investigation and study and he shall furnish any information in his possession which is so requested and he shall assign such assistants and investigators to said commission as it may request. The commission may require the co-operation of all agencies of state and local governments.

The commission may require by summons the attendance and testimony under oath of witnesses and the production before it of books and papers relating to any matter being investigated by it pursuant to the provisions of this resolve. Such a summons may be issued by the commission only upon a vote of the commission and shall be served in the same manner as summonses for witnesses in criminal cases issued on behalf of the commonwealth and all provisions of law relative to summonses issued in such cases shall apply to summonses issued under this resolve so far as applicable. Any justice of the supreme judicial court or of the superior court may upon application by the commission compel the attendance of witnesses summoned as aforesaid and the giving of testimony under oath before the Commission in furtherance of any investigation under this resolve in the same manner and to the same extent as before said courts.

The commission shall establish rules of procedure governing the conduct of its hearings which shall be made available in printed form to each witness prior to his testimony. Witnesses shall have the right to be represented by counsel and shall before testifying be sworn. Witnesses shall testify only at private hearings and the same provisions with reference to secrecy which govern proceedings of a grand jury shall govern all proceedings of the Commission.

Upon order of the commission its counsel shall present to a grand jury for its action, or submit to the attorney general, a district attorney or other law enforcement agency, such evidence which has come to the attention of the com-

mission as in the opinion of the commission warrants such presentation or submission.

The commission shall report to the general court annually on or before the first Wednesday in December in each year the results of its investigations and study and its recommendations, if any, together with drafts of legislation necessary to carry such recommendations into effect by filing the same with the clerk of the senate and shall file a final report not later than the last Wednesday in June, nineteen hundred and sixty-five. The commission shall also file a copy of each such report with the governor.

Approved July 27, 1962.